

**SANITIZED DEC. 05-446 MFE – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION 9/9/05 – ISSUED 9/21/05**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- REVOCATION OF BOND WAIVER REQUIREMENT AFFIRMED -- Because W. Va. Code § 11-14C-13(a)(13) [2003, 2004] mandates that a licensee who has been granted a waiver of the bonding requirement and thereafter violates any provision of Article 14C, shall file the applicable bond, no other sanction but that of revocation of said waiver is permissible under the applicable statute.

FINAL DECISION

On June 27, 2005, the Excise Tax Unit of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office issued a letter to the Petitioner, informing same that, because it had violated a provision of W. Va. Code § 11-14C-13(a)(13) [2003, 2004], the waiver of the bond requirements had been revoked (for late filing of monthly tax returns) and that a motor fuel excise tax surety bond or cash bond must be in place by July 12, 2005.

Thereafter, by mail postmarked August 6, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for review. *See* W. Va. Code § 11-10A-8(3) [2002].

Subsequently, notice of a hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of W. Va. Code §§ 11-14C-13(14) [2003, 2004] and 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioner is an importer of motor fuel who routinely purchases same out-of-state for sale in the State of West Virginia.

2. Prior to January 1, 2004 the motor fuel excise tax law required Petitioner to remit said tax directly to the State of West Virginia on its purchased fuel. Effective January 1, 2004, Petitioner was mandated by statute to pay the tax to the supplier at the earlier collection point and that the supplier was the one obligated to remit the tax to the State of West Virginia.

3. On October 31, 2003, Respondent approved Petitioner's request for waiver of surety bond because it had been determined that Petitioner had demonstrated eighteen (18) months of good filing in accordance with W. Va. Code § 11-14C-13. However, Petitioner was warned in that letter that any violation of the provisions in W. Va. Code § 11-14C may result in waiver revocation.

4. On July 7, 2004, Petitioner filed its June, 2004 Importer Report (due June 30, 2004) seven (7) days late.

5. On March 5, 2005, Petitioner filed its February, 2005 Importer Report (due February 28, 2005) five days late.

6. On March 12, 2005, Petitioner filed its 2004 Motor Fuel Floorstock Inventory Report (due January 31, 2005) forty (40) days late.

7. On June 27, 2005, Respondent advised Petitioner by letter (State's Exhibit 4) that Respondent had thereby revoked the waiver of the bond requirement because of the late filing of monthly tax returns and that an acceptable bond must be in place by July 12, 2005.

DISCUSSION

The only issue is whether the Petitioner has shown that its late filing of reports should not warrant the revocation of the bond waiver in this case.

Pursuant to W. Va. Code § 11-14C-19 [2003, 2004], if no tax is due, the Petitioner, as a licensed importer, is still required to file an importer report before the last day of the calendar month for the preceding month.

Also, W. Va. Code § 11-14C-5 [2003, 2004] mandates that every licensee who on the effective date of a rate change has in its inventory any motor fuel upon which tax has been paid, must take a physical inventory and file a report with the Tax Commissioner within thirty (30) days after the effective date of the rate change and shall pay, at the time of filing the report, any additional tax due under the increased rate.

Petitioner does not deny the fact that it filed the two (2) importer reports and the one (1) inventory report late; however, Petitioner believes that revoking its bond waiver requirement is too severe of a penalty and that a warning is more in order.

The problem with the Petitioner's argument is that a warning cannot be found in the statute in any shape or form. W. Va. Code § 11-14C-13(a)(13) [2003, 2004] could not be more clear,..."Provided, that when a licensee that has been granted a waiver of the requirement to file a bond violates a provision of this article, the licensee shall file the applicable bond as stated in this subsection."

Violation of a provision means just that; a single report, if filed late, is a violation of any provision. Petitioner filed three (3) late reports, so clearly the revocation is applicable without any further warning.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner to show that the assessment or order is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. In light of the clear language of W. Va. Code § 11-14C-13(a)(13) [2003, 2004], the Petitioner in this matter has failed to carry the burden of proof with respect to its argument that its filing of late motor fuel reports should warrant a warning, instead of the revocation of its existing waiver of the bonding requirement.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the June 27, 2005 letter (order) to Petitioner revoking its waiver of the bond requirement is **AFFIRMED** and that Petitioner shall immediately provide a suitable bond (surety or cash) in the proper amount as previously ordered by Respondent.